Message Text

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FM AMEMBASSY MADRID
TO SECSTATE WASHDC IMMEDIATE 533
INFO JUSMG/MAAG MADRID
16TH AIR FORCE TORREJON
COMNAVACTS ROTA
USCINCEUR VAIHINGEN
HQS USAF/JACI WASHDC

C O N F I D E N T I A L SECTION 1 OF 2 MADRID 7451

JOINT EMBASSY/JUSMG MESSAGE

E.O. 11652: GDS
TAGS: MARR, MILI, SP
SUBJ: G-3 TARIFF

REF: STATE 252824

1. BELIEVE BEST METHOD OF CONTINUING DIALOGUE AND THUS STRINGING OUT DISCUSSIONS IS TO PROVIDE OUR WRITTEN RESPONSE TO MINISTER HACIENDA'S REPORT AS SOON AS POSSIBLE IN FORM OF MEMO TO PERMANENT SECRETARIAT OF JOINT COMMITTEE. SUCH RESPONSE WOULD HAVE BEST IMPACT WERE IT TO BE PRECEDE ANY SUDDEN ACTION BY PORT AUTHORITIES IN SPAIN, AS MENTIONED EMBASSY 6476. IN SHORT, IT WOULD APPEAR TO OUR BEST TACTICAL ADVANTAGE TO HAVE OUR RESPONSE IN AND ALREADY UNDER CONSIDERATION BY GOS IF AND WHEN NOTE OF PROTEST MIGHT BECOME NECESSARY.

2. ACCORDINGLY, WE ARE SUBMITTING IN REMAINING PARAS
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THIS MESSAGE A DRAFT REPLY TO GOS VIS PS. WE BELIEVE

RESPONSE, WHICH PREPARED BY JUSMG/MAAG, PROVIDES SOME EFFECTIVE COUNTER-ARGUMENTS TO GOS REPORT AND IS OF SUFFICIENT LENGTH AND DETAIL TO DELAY SPANISH REPLY UNTIL NEXT JC MEETING EARLY NEXT YEAR. THIS IN TURN PROVIDES US SOME RESPITE, POSSIBLY UNTIL LATER STAGE OF AFC NEGOTIATIONS.

3. THEREFORE, UNLESS DEPT PERCEIVES SOME OBJECTION, EMBASSY PLANS TO SUBMIT MEMO TO PS MEETING SCHEDULED FOR WEDNESDAY, DEC 4. MEMO AS FOLLOWS.

4. QUOTE: AT LAST MEETING OF JC ON DEFENSE MATTERS, AMBASSADOR RIVERO POINTED OUT THAT U.S. AUTHORITIES HAD JUST RECEIVED THE LENGTHY SPANISH POSITION REGARDING SUBJECT AGENDA ITEM AND HAD NOT HAD TIME TO TRANSLATE AND ANALYZE IT. HE SUGGESTED, THEREFORE, THAT THE MATTER BE RETURNED TO THE PS FOR SOLUTION. SPANISH POSITION, AS REFLECTED IN MINISTERIO DE HACIENDA LETTER DATED MAY 29, 1974, AND ADDENDUM THERETO DATED JUNE 14, 1974, HAS BEEN CAREFULLY STUDIED AND FOLLOWING COMMENTS ARE OFFERED IN REPLY THERETO.

5. AT OUTSET, WE WISH TO EMPHASIZE THAT U.S. POSITION REGARDING ITS EXEMPTION FROM APPLICATION OF THIS TARIFF UNDER TAX RELIEF ANNEX HAS BEEN UNCHANGED AND CONSISTENT SINCE PRESENT TARIFF WAS PUBLISHED IN 1966 AND IS SAME POSITION THAT WAS EXPRESSED DURING YEARS THAT THIS SAME TARIFF EXISTED AS TARIFA MUELLAJE III PRIOR TO 1966. SPANISH POSITION, ON OTHER HAND, HAS NOT BEEN CONSISTENT AND, IN OUR VIEW, HAS EVEN BEEN SELF-CONTRADICTORY ON AT LEAST ONE POINT. IT IS PRECISELY THIS LACK OF CONSISTENCY AND SELF-CONTRADICTION THAT LEADS U.S. AUTHORITIES TO BE CONVINCED THAT 1966 LAW ESTABLISHING G-3 TARIFF WAS AN ATTEMPT ON PART OF SPAIN TO UNILATERALLY CHANGE PROVISIONS OF OUR FISCAL RELIEF AGREEMENT IN ORDER TO COMPLY WITH DESIRE OF WORLD BANK THAT U.S. EXEMPTION BE AVOIDED.

6. THE SELF-CONTRADICTION REFERRED TO CONCERNS THE TERM USED TO CHARACTERIZE NATURE OF TARIFF. IN 1971, SPANISH CONFIDENTIAL

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AURHORITIES ARGUED THAT G-3 WAS A"TASA", WHICH THEY DEFINED AS A SERVICE FEE AND THAT, THEREFORE, THE U.S. WAS NOT EXEMPT. NOW, SPANISH AUTHORITIES ARGUE THAT THE U.S. IS NOT EXEMPT FROM G-3 BECAUSE IT IS NOT A "TASA" (FIRST PARA OF PAGE 2, PARA 2 ON PAGE 3, FIRST TWO PARAS ON PAGE 4, AND LAST PARA PAGE 2, ADD., OF MAY 29 74 LETTER) BUT IS RATHER A "PRICE".

7. LACK OF CONSISTENCY MENTIONED REFERS TO POSITION TAKEN
BY MINISTERIO DE HACIENDA IN 1961 AS COMPARED TO ITS
POSITION NOW. IN ITS LETTER DATED APRIL 8, 1961, MINISTRY
DEFINED AS A PARAFISCAL TAX THE CHARGE "FOR THE TEMPORARY
OCCUPATION OF PUBLIC DOMAIN, SUCH AS THE DOCKS OF A PORT,
NECESSARY FOR LOADING AND UNLOADING OPERATIONS." THE
REFERENCE, OF COURSE, WAS TO THE 4 PERCENT CHARGE ESTABLISHED BY
DECREE 138/1960 WHICH WAS DIRECTLY CONNECTED TO TARIFA
MUELLAJE III, AND THE LETTER CONCLUDED THAT SUCH A CHARGE
WAS NOT "A MATTER OF A CHARGE BEING IMPOSED FOR PERFORMANCE
OF AN APPRAISABLE ACTIVE SERVICE FOR THE EXCLUSIVE
BENEFIT OF AN INTERESTED PARTY". NOW THE MINISTRY APPEARS
TO BE ARGUING THAT THE G-3 TARIFF, WHICH IS STILL A CHARGE
FOR THE TEMPORARY OCCUPATION OF PUBLIC DOMAIN, I.E. PORT
DOCKS, FOR LOADING AND UNLOADING OPERATIONS, IS A CHARGE
FOR THE PERFORMANCE OF AN ACTIVE APPRAISABLE
SERVICE FOR THE EXCLUSIVE BENEFIT OF INTERESTED OR
SOLICITING PARTY (PARA 4, PAGE 4 OF LETTER AND FIRST
FIVE PARAS OF PAGE 3 OF ADDENDUM). IN PARA 4 OF THE
REFERENCED 1974 LETTER, IT IS ARGUED THAT THE PRIOR
OPINION OF THAT SAME MINISTRY WAS UNDOUBTEDLY BASED ON
CONCLUSION THAT CHARGE WAS A "TASA" AND NOT BECAUSE IT
WAS A CHARGE FOR A SERVICE NOT REQUESTED AND RECEIVED.
ON CONTRARY, THE MAIN THRUST OF LETTER WAS THAT CHARGE
WAS A "TASA" BECAUSE IT WAS FOR THE USE OF PUBLIC DOMAIN
AND WAS NOT A CHARGE FOR AN ACTIVE, APPRAISABLE SERVICE
REQUESTED AND RECEIVED. SPECIAL EMPHASIS SHOULD BE GIVEN
TO THE TERM "ACTIVE" SERVICE. THIS WAS ONE OF TERMS USED
BY MINISTRY IN ITS 1961 LETTER TO DESCRIBE A SERVICE FOR
WHICH A NON-EXEMPT CHARGE MIGHT BE MADE AND IT CONCLUDED
THAT FURNISHING OF DOCKS FOR LOADING AND UNLOADING WAS
NOT AN "ACTIVE SERVICE. THIS SAME POINT WAS MADE IN
PS (U.S.) MEMO #819 AND WE ARE UNABLE TO FIND ANY SPECIFIC
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REPLY TO THAT POINT IN MINISTRY'S ADDENDUM TO THE 1974
LETTER. POINT IS THAT ALL CHARGES MADE BY A GOVT AND ITS
INSTRUMENTALITIES MAY BE CONSIDERED CHARGES FOR SERVICES
REQUESTED AND RECEIVED AND THAT EXCEPTION IN THE TAX RELIEF
ANNEX FOR CHARGES FOR "SERVICES REQUESTED AND RECEIVED"
HAS NO MEANING UNLESS THE METHODS OF REQUESTING AND
RECEIVING ARE DISTINGUEISHED, ONEFROM OTHER. DISTINCTION
CLEARLY IS ONE BETWEEN GENERAL AND SPECIFIC SERVICES, AND
THIS DISTINCTION IS BASED ON WHETHER REQUEST AND RECEIPT
(OR FURNISHING) OF SERVICE IS "ACTIVE" OR PASSIVE, EXPLICIT
OR IMPLIED. SERVICES OF A CRANE MUST BE EXPLICITLY
REQUESTED AND ACTIVELY FURNISHED AND UTILIZED. SERVICES
OF FIXED INSTALLATIONS SUCH AS A SOCK, AVAILABLE WITHOUT
FURTHER ACTION TO THOSE DESIRING TO USE IT, ARE IMPLIEDLY
REQUESTED AND PASSIVELY FURNISHED.

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O R 271600Z NOV 74
FM AMEMBASSY MADRID
TO SECSTATE WASHDC IMMEDIATE 534
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16TH AF TORREJON
COMNAVACTS ROTA
USCINCEUR VAIHINGEN
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8. MINISTRY POINTS OUT IN ITS MOST RECENT LETTER, THAT EXCEPTION IN ANNEX FOR SERVICES REQUESTED AND RECEIVED, TAKEN IN CONTEXT, APPLIES ONLY TO CHARGES IN NATURE OF A TAX AND NOT TO WHAT MINISTRY CHOOSES TO CALL "PRICES". WE DO NOT AGREE; BUT EVEN IF THIS ASSERTION WERE ACCEPTED, PROVISION STATES THAT PAYMENT MAY BE MADE BY THE U.S. LEAVING THE DECISION AS TO PAYMENT OF SUCH A CHARGE WITHIN DISCRETION OF U.S. AND FURTHER ESTABLISHING BROAD SCOPE INTENDED BY ANNEX.

9. BASIC POINT, HOWEVER, WHICH MUST BE RESOLVED IN ORDER TO FINALLY DECIDE THIS ISSUE IS NATURE OF G-3 TARIFF; AND IT IS MANNER IN WHICH SPANISH AND U.S. AUTHORITIES ATTEMPT TO DETERMINE THAT NATURE THAT HAS CAUSED OUR INABILITY TO REACH AGREEMENT TO DATE. AT OUTSET, U.S. COULD EASILY TAKE POSITION THAT NATURE THAT A CHARGE MUST HAVE IN ORDER TO FALL WITHIN EXEMPTION PROVISIONS OF ANNEX IS SIMPLY AND SOLELY THAT IT BE A CHARGE BY OR FOR BENEFIT OF SPANISH GOVT, A POLITICAL SUBDIVISION OF A QUASI-

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GOVERNMENTAL ORGANIZATION. SPANISH AUTHORITIES HAVE AGREED THAT G-3 IS A CHARGE BY OR FOR BENEFIT OF QUASI-GOVERNMENTAL ORGANIZATIONS. ANNEX, THEN, COVERS CHARGES "OF ANY NATURE" (EMPHASIS ADDED) BY OR FOR SUCH ORGANIZATIONS.

10. RECOGNIZING, HOWEVER, THAT THIS ARGUMENT ALONE IS UNACCEPTABLE TO SPAIN AND DESIRING TO REACH AN ACCEPTABLE AGREEMENT ON THIS ISSUE, THE U.S. HAS CARRIED ITS ARGUMENTS ONE STEP FURTHER, TO WIT: IF THE CHARGE, TO COME WITHIN EXEMPTION, MUST HAVE THE NATURE OF A TAX IN ADDITION TO BEING BY OR FOR THE MENTIONED ORGANIZATIONS, THE G-3 HAS SUCH A NATURE.

11. HOW DO WE DETERMINE NATURE OF G-3 TARIFF. SPANISH AUTHORITIES SUGGEST APPLICATION OF SPANISH LAW AND ITS DEFINITIONS AND SUGGEST THAT IF G-3 WERE A "TASA", IT WOULD BE EXEMPT. LAW OF DEC 26, 1958 CONCERNING PARA-FISCAL "TASAS Y EXACCIONES" DEFINES "TASAS" AS PAYMENTS LEGALLY DEMANDED BY STATED ADMINISTRATION, AUTONOMOUS ORGANISMS, PUBLIC LAW ENTITIES, PUBLIC OR ASSIMILATED FUNCTIONARIES, MADE IN RETURN FOR A SERVICE FOR UTILIZATION OF PUBLIC DOMAIN, OR FOR CARRYING OUT OF AN ACTIVITY WHICH AFFECTS PAYOR IN A PARTICULAR MANNER. THAT, IN THE VIEW O F U.S. AUTHORITIES, IS A VERY ACCURATE DESCRIPTION OF G-3 TARIFF. BUT MINISTRY LETTER STATES THAT G-3 TARIFF IS NOT IN CONSONANCE WITH THAT LAW. BY WAY OF EXPLANATION, MINISTRY ADDS THAT FUNDS DO NOT ENTER PUBLIC TREASURY; AND YET G-3 LAW HAS A PROVISION FOR THAT POSSIBILITY. IN FURTHER EXPLANATION OF LACK OF CONSONANCE, MINISTRY POINTS OUT THAT AMOUNTS OF TARIFF ARE ESTABLISHED BY ORDER OF MINISTRY OF PUBLIC WORKS AND NOT BE LAW, AS IN CASE OF A TAX; BUT MOP IS AN AGENCY SUCH AS DESCRIBED IN DEFINITION OF "TASAS" IN THE 1958 LAW AND THE MOP DOES NOT CREATE THE TARIFF BUT RATHER DETERMINES THE SPECIFIC AMOUNTS TO BE CHARGED WITHIN GUIDELINES PROVIDED BY 1966 LAW WHICH CREATED TARIFF. STILL REFERRING TO 1958 LAW, MINISTRY ASSERTS THAT NOWHERE IN 1966 LAW IS THE WORD "TASA" USED. TO THE U.S., IT APPEARS APPARENT THAT REASON THAT 1958 LAW INCLUDED A DEFINITION OF "TASAS" WAS SO THAT THEY COULD BE RECOGNIZED AS SUCH IN CASES WHEN SUCH

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CHARGES WERE ESTABLISHED BUT NOT SPECIFICALLY CALLED

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"TASAS". FINALLY, IN THIS REGARD, MINISTRY ADDS THAT
PROFITABILITY PROVISIONS OF 1966 LAW ARE COMPLETELY
FOREIGN TO CONCEPT OF A "TASA". UNFORTUNATELY, WHY THIS
IS SO IS NOT EXPLAINED, EITHER BY MINISTRY OR IN
DEFINITION OF "TASAS" IN 1958 LAW. U.S., ON OTHER
HAND, VIEWS SO-CALLED "PROFITS" ENVISIONED BY 1966 LAW
AS MERELY FUNDS TO BE APPLIED TO IMPROVEMENT AND
DEVELOPMENT OF PORT FACILITIES AND NOT FUNDS DESIGNED
TO BE A FORM OF "ENRICHMENT" FOR PORT ORGANIZATIONS OR
THEIR PERSONNEL.

12. SPANISH POSITION, GIVEN ABOVE ARGUMENTS AND U.S.
ASSERTION THAT G-3 IS ESSENTIALLY SAME CHARGE AS FORMER
TARIFF FROM WHICH U.S. WAS GRANTED EXEMPTION,
IS THAT G-3 IS A DIFFERENT CHARGE BECAUSE OF
WORDING OF 1966 LAW, I.E., THAT LAW DOES NOT USE WORD
TAX OR "TASA", DOES NOT CITE ANY OF GENERAL TAXATION
LAWS, IS NOT ADMINISTERED BY HACIENDA AND ADDS CONCEPT
OF "PROFITABILITY". AND YET IT IS SAME CHARGE AS IT WAS
BEFORE. IT IS FOR SAME CONCEPT OF LOADING AND UNLOADING;
IT IS FOR SAME PURPOSE, TO WIT: FINANCING THE PORT
OPERATION; FUNDS ARE COLLECTED AND USED BY SAME AUTHORITY,
THE JUNTA DE OBRAS DEL PUERTO; AND IT IS ADMINISTERED BY
SAME AUTHORITY, TO WIT: THE MINISTERIO DE OBRAS PUBLICAS.
ONLY DIFFERENCE VIEWED BY U.S. AUTHORITIES IS REMOVAL OF
CHARGE FROM ANY DIRECT CONTROL BY MINISTERIO DE HACIENDA.

13. IN SUMMARY, WE HAVE ANALYZED SPANISH POSITION AND
CONCLUDED THAT G-3 TARIFF, WHETHER VIEWED SIMPLY AS A
CHARGE BY AND FOR A QUASI-GOVERNMENTAL AGENCY OR AS A
"TASA" COMES WITHIN EXEMPTION PROVISIONS OF TAX RELIEF
ANNEX AND IS ESSENTIALLY SAME CHARGE AS TARIFA MUELLAJE
III FOR WHICH U.S. WAS GRANTED EXEMPTION PRIOR TO 1966;
AND WE ARE LEAD, THERFORE, TO INESCAPABLE CONSLUSION THAT
THE 1966 LAW, WHILE IT MAY HAVE MADE SUBSTANTIAL CHANGES
IN OPERATION OR FINANCING OF SPANISH PORTS AND MAY HAVE
BEEN NECESSARY TO COMPLY WITH CONDITIONS PRECEDENT IMPOSED
BY WORLD BANK IN CONNECTION WITH A LOAN, DID NOT
ESSENTIALLY CHANGE NATURE OR PURPOSE OF TARIFF FOR
LOADING AND UNLOADING AND, THEREFORE, IT DID NOT AFFECT
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PREVIOUSLY RECOGNIZED EXEMPTION OF U.S. UNQUOTE
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